95-1083

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CARL DAUGHERTY, PLAINTIFF

versus

CITY OF EL PASO, DEFENDANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. *Did the Court of Appeals err in holding that the Americans With Disabilities Act of 1990 does not Require an Employer to take a positive action to, place a qualified individual with a disability in a vacant job position.*

2. *Did the Court of Appeals err in holding that as a matter of law insulin dependent diabetics are a "direct threat" and are prohibited from operating a motor vehicle without requiring an individualized assessment of the individual's present ability to safely perform essential job function.*

LIST OF PARTIES

Carl Daugherty, Plaintiff

City of El Paso, Defendant

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OPINION BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion in this case on July 3, 1995. The opinion is reported in 56 F.3rd 695 and has been reprinted in Appendix B to the Appendix filed herewith. A motion for rehearing was denied without opinion on August 8, 1995.

The related proceedings in the United States District Court for the Western District of Texas produced no written opinions. A copy of the Judgment has been reprinted in Appendix A to the Appendix filed herewith.

JURISDICTION

The judgment of the United States District Court for the Western District of Texas was entered on March 7, 1994. The Defendant, the City of El Paso, filed a Notice of Appeal to the Court of Appeals for the Fifth Circuit on March 30, 1994.

The Record on appeal was timely docketed in the Court of Appeals for the Fifth Circuit.

The Court of Appeals for the Fifth Circuit rendered its opinion on July 3, 1995.

A Motion for Rehearing was timely filed after an extension of time was granted to the Plaintiff, Carl Daugherty on July 24, 1995.

The Motion for Rehearing was denied by the Court of Appeals for the Fifth Circuit on August 8, 1995.

The jurisdiction of the Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS AND AND STATUTES INVOLVED

The relevant statutory provisions and federal regulations are as follows:

42 USC § 12112(a) states:

"No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

42 USC § 12112(b)(5)(A) states:

"As used in subsection (a), the Term "discriminate" includes -
"not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;"

42 USC § 12111(9) states

"Reasonable accommodation. The term "reasonable accommodation" may include - (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment of devices, appropriate adjustment or modifications of examinations, training material or policies, the provision of qualified readers or interpreters, and the similar accommodations for individuals with disabilities."

42 USC § 12111(10) states:

Undue hardship. (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B). (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include -

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the

provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity."

42 USC § 12111(3) states:

"Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."

42 USC § 12111(8) states:

> "Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

29 CFR § 1630.3(r) (Pertinent Part) states:

> "The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk; (2) The nature and severity of the potential harm; 93) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."

STATEMENT OF THE CASE

This is a case alleging discrimination in employment under the Americans with Disability Act of 1990. (42 USC §§ 12101, et. seq.)

On June 18, 1992, Carl Daugherty a "Coach Operator" was a part time civil service employee of the City of El Paso Mass Transit Department. He was employed as the operator of a bus that seated more than 16 passengers which was subject to the regulation of the U.S. Department of Transportation. On that date he was diagnosed as an insulin dependent diabetic. The Mass Transit Department of the City of El Paso operated over 60 Lift buses which are not subject to the jurisdiction of the U.S. Department of Transportation and additionally are not subject to the civil service regulation of the City of El Paso. On that date Carl Daugherty was placed by the City of El Paso in a leave of absence without pay status due to the insulin dependent diabetes prohibition of the U.S. Department of Transportation applicable to buses that seat more than 16 passengers. The City of El Paso has no regulation or policy prohibiting insulin dependent diabetics from operating any type of motor vehicle or machinery.

There are no City of El Paso regulations prohibiting intra department transfers. The City of El Paso never had a physician examine the physical condition of Carl Daugherty and Carl Daughtery's treating physician never prohibited him from operating a motor vehicle and had fully released him to return to work as a bus driver.

The Civil Service Regulations of the City of El Paso authorize the promotion of part time employees to full time employment and give a preference to civil service employees who have disabilities in promotions and transfers.

Between June, 1992, and the date of trial the City of El Paso hired more than 1200 new employees including seven airport shuttle bus drivers and over sixty Lift bus operators. There existed no prohibition on the employment of Carl Daugherty as a Lift bus operator and the only prerequisite for employment that Mr. Daugherty lacked for the airport shuttle bus operator was an exam which was less stringent that the coach operator exam he had taken in first obtaining his employment with the City of El Paso and which could have been waived by the City of El Paso under its regulations.

The City of El Paso's Personnel Department talked about placing Carl Daugherty in several position such as toll booth operator and airport shuttle operator. The Personnel Department was able to waive the language and examination requirement for the toll

booth collector position but failed to refer Carl Daugherty for a departmental interview. The Personnel Department has no authority to hire personnel for other City of El Paso departments. After filing a complaint with the Equal Employment Opportunity Commission, the Personnel Department did refer Carl Daugherty to the Convention Center for a shuttle bus operators position. Carl Daugherty was employed by the City of El Paso in April 1993 for six days as the operator of the Convention Center's VIP shuttle bus until the City of El Paso realized it was a bus subject to the U.S. Department of Transportation regulations on insulin dependent diabetics.

There exist provisions under the U.S. Department of Transportation regulations for the waiver of regulations. Carl Daugherty asked the City of El Paso to assist him in applying for a waiver to the provision relating to insulin dependent diabetics operating buses which seat more than 16 passengers. The City of El Paso refused to assist Carl Daugherty in the waiver process.

Carl Daugherty asked the City of El Paso to place him in a vacant job opening. The Texas Rehabilitation Commission, a state agency, offered to assist the City of El Paso in placing Carl Daugherty or retraining him. The City of El Paso failed to respond to the Texas Rehabilitation Commissions' offers or to place Carl Daugherty in one of the 1200 positions for which new employees were hired.

On January 28, 1993 Carl Daugherty filed a complaint with the Equal Employment Opportunity Commission and on April 29, 1993 Carl Daugherty obtained a right to sue letter. Suit was timely filed in the United State District Court for the Western District of Texas.

On February 15, 1994, a jury found that the City of El Paso had discriminated against Carl Daugherty due to his disability and awarded $5000 in compensating damages. On March 7, 1994, the Court entered a judgment for $5000 in compensating damages, $21,785.69 in back pay, $12,000 for reasonable attorney's fees, and pre and post judgment interest.

The City of El Paso appealed and the appellate court reversed and remanded the case on July 2, 1995. Carl Daugherty timely filed a motion for rehearing which was denied on August 8, 1995.

ARGUMENT

I THE COURT OF APPEALS HAS ERRED IN HOLDING THAT "REASONABLE ACCOMMODATION" UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 DOES NOT REQUIRE THE EMPLOYER TO TAKE A POSITIVE ACTION TO PLACE A QUALIFIED INDIVIDUAL WITH A DISABILITY IN A VACANT JOB POSITION.

The Americans with Disabilities Act of 1990 clearly states that it is discrimination to not reasonably accommodate a qualified individual with a disability by placing him in a vacant job position unless the employer can

demonstrate that the accommodation would pose an undue hardship on the operation of the business.

At the time of Carl Daugherty's requests for reasonable accommodation there existed no prohibitions on an insulin dependent diabetic driving a bus seating less than 16 passengers. Carl Daugherty was at that time a licensed Texas driver who had experience with the City of El Paso, operating buses seating more than 16 passengers. The City of El Paso, prior to his insulin dependent diabetics, had tested and qualified him to operate such buses. After Carl Daugherty's diagnosis as an insulin dependent diabetic the City of El Paso hired 1200 new employees, including seven airport shuttle bus drivers and over sixty LIFT bus drivers. The LIFT bus drivers are contract labor not covered by the civil service system of the City of El Paso and do not require any written employment examination but only a valid Texas operators drivers license (Not even a commercial drivers license). The airport shuttle bus position required a written examination and a valid Texas operators license. The written examination was not as difficult as the examination that Carl Daugherty had passed to become a "coach operator" and could be waived by the City of El Paso. Carl Daugherty was fully released to return to work as a bus driver. Carl Daugherty requested that he be reasonably accommodated by being placed in a vacant position. At trial the City of El Paso presented no evidence that any reasonable

accommodation for Carl Daugherty would pose an "undue hardship" as required under 42 USC § 12111(10).

The Court of Appeals in its opinion partially justifies its position on the "undue hardship" standard but ignores the lack of evidence of undue hardship and that the burden of proof is on the employer to prove undue hardship.

The Court also talks about the fact Carl Daugherty was treated no differently than any employee whose job was eliminated. Unfortunately Carl Daugherty's job was not eliminated. The trial record reflects numerous part time coach operator hirings as well as promotion to full time positions. Carl Daugherty was removed from his position due to a health related disqualification. The Court talks about the lack of proof in that Carl Daugherty did not show he was treated any worse than any other City of El Paso employee. The Americans with Disabilities Act of 1990 does not require proof that a qualified individual with a disability is treated worse than a qualified individual without a disability. Carl Daugherty was in a one of kind situation. He was the only coach operator with the City of El Paso to become an insulin dependent diabetic. He requested a vacant job position as explicitly authorized by 42 USC § 12111(9)(B). The City of El Paso offered no evidence of undue hardship in accordance with 42 USC § 12111(10). The Court of Appeals substantially based its decision that an insulin dependent

diabetic presents a direct threat to the health or safety of others with no evidence on the assumption that diabetics as a matter of law should not be allowed to operate any motor vehicle.

This position is based on a distorted reading of Chandler v. City of Dallas 2 F 3rd 1385 (5th Cir, 1993) which involved the Rehabilitation act of 1973, 29 USC § 794 et. seq. Chandler involved a written policy decision by the City of Dallas that insulin dependent diabetics could not operate city owned motor vehicles and provided a functioning mechanism that would allow an insulin dependent diabetic to operate a motor vehicle on a case by case basis. (i.e. an individualized assessment)

The unfounded prejudice exhibited by the Court of Appeals toward insulin dependent diabetics is precisely the reason the Americans with Disabilities Act of 1990 was enacted. The decision is based on misconceptions as to the limitations of a handicapped class - insulin dependent diabetics - with no consideration as to the abilities of an individual. Carl Daugherty has not been demonstrated to be a direct threat to the health and safety of anyone. He asked to be placed in any one of the over 1200 vacant positions the City of El Paso hired new employees. He sought the aid of a state agency who like Carl Daugherty was ignored by the City of El Paso. Carl Daugherty only asks that he is treated in accordance with the provision of the Americans with Disabilities Act of 1990,

not as a leper. The City of El Paso does not have a policy of prohibiting insulin dependent diabetics from operating city owned motor vehicles nor for that matter any policies explicitly directed at insulin dependent diabetics. There exists no evidence that Carl Daugherty was determined by the City of El Paso to be a direct threat to the health or safety of anyone. An individual assessment of "direct threat" is required by 29 CFR § 1630(r), and no individualized assessment was ever made by either the City of El Paso or the Court of Appeals.

The Court of Appeals by its decision has effectively eliminated the requirement that an employer make a "reasonable accommodation" since by the very nature and definition of "reasonable accommodation" an employer would have to take some action, be it installing handicapped access ramps or placing a disabled individual in a vacant job position to comply with the Americans with Disabilities Act of 1990.

II THE COURT OF APPEALS ERRED IN HOLDING THAT AS A MATTER OF LAW INSULIN DEPENDENT DIABETICS ARE A "DIRECT THREAT" AND ARE PROHIBITED FROM OPERATING A MOTOR VEHICLE WITHOUT REQUIRING AN INDIVIDUALIZED ASSESSMENT OF THE INDIVIDUAL'S PRESENT ABILITY TO SAFELY PERFORM ESSENTIAL JOB FUNCTIONS.

As noted above the City of El Paso had no policies prohibiting the operation of motor vehicles by insulin dependent diabetics. Carl Daugherty was prohibited only from operating buses which seat more than 16 people. The Court of Appeals incorrectly interprets Chandler v. City of Dallas, supra, which involved only the Rehabilitation Act of 1973, not the Americans with Disabilities Act of 1990. In Chandler, the City of Dallas had established a written policy with provision for individualized exemption in reference to the operation of city owned vehicles by insulin dependent diabetics. The City of El Paso had no such policy or provision for exemption. The Court of Appeals reads Chandler as an absolute prohibition on insulin dependent diabetics operating motor vehicles as opposed to a reasoned written policy decision of the City of Dallas with adequate provision for individualized review for exemption. The Americans with Disabilities Act requires an individualized assessment of an individual's present ability to safely perform the essential function of the job. 29 CFR § 1630.3(r). Neither the City of El Paso nor the Court of Appeals ever made an individualized assessment of Carl Daugherty. Both the City of El Paso and the Court of Appeals stereotype insulin dependent diabetics as people who are " direct threats" to society whenever they are behind the wheel of any motor vehicle. There exists no legal or factual foundation for this stereotype. No medical evidence was ever presented by the City of El Paso or discussed by the

Court of Appeals to substantiate this stereotype. The very purpose of the Americans with Disabilities Act of 1990 is to prevent the stereotypical prejudice exhibited by The Court of Appeals and to treat disabled people on an individual basis. Not all insulin dependent diabetics are "direct threats" to the public safety when they are behind the wheel of any motor vehicle whether their own or that of the City of El Paso. Sarsycki v. United Parcel Service 862 F. Supp. 336 (W.D. Okla. 1994) Howell v. Michelin Tire Corp. 860 F. Supp. 1488 (M.D. Ala., 1994). Carl Daugherty should have been assessed as an individual, not as a member of a discriminated class.

Conclusion

The Court should grant certiorari in this case because the issue of not requiring an employer to take any action to reasonably accommodate eliminates any requirement of "reasonable accommodation" under the American with Disabilities Act of 1990 and prevents any meaningful implementation of the Act or the intention of Congress in passing the Act. Further the issue of not requiring an individualized assessment of a disabled individual's ability to perform job functions allows the worse case stereotype to be assumed and thus prevents any meaningful implementation of the American with Disabilities Act of 1990.

There exists conflicts between the interpretation of what the Court of Appeals stated and the positions of trial courts in two other circuits. The elimination of the reasonable accommodation requirement by the Court of Appeals prevents handicapped individuals from obtaining the same treatment in the 5th Circuit that they would enjoy in the rest of the Country.

The stereotyping of diabetics as the lepers of motor vehicle operation without an individualized assessment of an individuals limitations is akin to characterizing all blacks as thieves or all Hispanics as lazy. No legal or factual basis exists for a classification based on the preconceived bias of the ignorant. Carl Daugherty is entitled to be treated as an individual and to have his limitations if they exist to be examined. The Americans with Disabilities Act grants him that right to individualized assessment. The Court of Appeals should not be allowed to subvert the expressed intent of Congress in requiring the handicapped to be treated as individuals with individual limitations. The Court of Appeals by its decision in this case has effectively eliminated the Americans with Disabilities Act as a law enforceable in the 5th Circuit. Its decision if allowed to stand would encourage other Circuits to follow and the disparity of treatment of the handicapped under the Americans with Disabilities Act would increase to the detriment of the powers of Congress to protect the handicapped.

Respectfully submitted,

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In the United States District Court
For the Western District of Texas
El Paso Division

Carl Daugherty,	§	
Plaintiff	§	
	§	
v.	§	EP-93-CA-311
	§	
The City of El Paso	§	
	§	

Order

Before this Court, on the 14th of February A.D., 1994, came to be considered and heard the above-captioned cause, wherein Carl Daugherty was Plaintiff and the City of El Paso was Defendant, and came all parties to such suit and their attorneys of record, and all such parties announced ready for trial.

A jury of seven good and lawful jurors, who being duly impaneled and sworn, and having heard and endured all the evidence, the arguments of counsel and the Court's charge, on their oath did, on the 15th day of February, 1994, for their verdict and in response to the definitions, instructions, and questions submitted to them by the Court make the following findings of fact:

Question 1

Do you find the defendant, the City of El Paso, discriminated against the Plaintiff, Carl Daugherty, in violation

of the Americans with Disabilities Act?

Question 2

What amount of money, if any, and if paid now and in cash, would fairly and adequately compensate the Plaintiff, Carl Daugherty, for any and all damages caused by the City of El Paso's discrimination against him in violation of the Americans with Disabilities Act?

The Jury, after extensive deliberation, answered "Yes" to Question 1, and awarded the Plaintiff $5,000.00 in response to Question 2. Consequently, the Defendant is liable for compensatory damages in the amount of $5,000.00.

The Court also finds the Defendant also intentionally engaged in discrimination in violation of the Americans with Disabilities Act. Thus, pursuant to the terms 42 U.S.C. §2000(e)-5(1), the Court finds the Plaintiff is entitled to backpay in the amount of $21,785.69 plus pre-judgment and post-judgment interest. [1,2]

Further, Plaintiff submitted its Motion for Award of Attorneys' Fees and Costs and an affidavit in support thereof. Plaintiff is commended for following the factors delineated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). However, based on the Court's extensive experience

with cases of this nature, the Court finds the amount of attorneys' fees requested ($32,647.50) to be clearly excessive.[3] The Court finds a rate of $150.00 to be appropriate. Furthermore, the Court finds a reasonable amount of hours for this case to be 80. Thus, the Court finds Plaintiff is entitled to attorney's fees in the amount of $12,000.00. Accordingly,

It is ordered Judgment for Plaintiff Carl Daugherty be entered as against Defendant City of El Paso, in the sum of $5,000.00 in compensatory damages and $21,785.69 in backpay, plus pre-judgment interest at the maximum rate allowed by law, dating from June 7, 1992. Further, Plaintiff is entitled to post-judgment interest on these amounts at the current allowable rate from the date of this judgment until paid.

It is further ordered the Plaintiff is entitled to attorneys' fees in the amount of $12,000.00.

It is further ordered all Court costs are hereby taxed against Defendant City of El Paso, for which execution may issue. All relief not specifically granted herein is hereby denied.

SIGNED this 4th day of March, 1994.

HONORABLE LUCIUS D. BUNTON
SENIOR DISTRICT JUDGE

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[1] The award of backpay, as an equitable remedy, is let to this Court's sound discretion one there has been a determination that there was discrimination by Defendant. Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L.Ed. 280 (1975). The amount of backpay is, of course, reduced by the amount the Plaintiff earned, or reasonably could have earned, during the interim between the discrimination and date of judgment. The court's award of $21,785.69 in backpay represents the $25,601.57 in lost wages minus the $3,815.67 Plaintiff's unemployment compensation during this period is not subject to set-off. Kaufman v. Sideral Corp., 695 F. 2d 343 (9th Cir. 1982).

[2] See Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988).

[3] Plaintiff's attorneys claim they spent approximately 210.75 hours in the preparation and trial of this case. They also request fees at rates of $150.00 and $200.00. The Court finds this case could have easily been conducted in approximately 80 hours. Furthermore, the Court finds $150.00 per hour is a reasonable fee for this type of case.

DAUGHERTY v. CITY OF EL PASO
Cite as 56 F.3d 695 (5th Cir 1995)

Carl DAUGHERTY, Plaintiff-Appellee,

v.

The CITY OF EL PASO,
Defendant-Appellant.

No. 94-50212.

United States Court of Appeals,
Fifth Circuit.

July 3, 1995.

After city employee was diagnosed as insulin-dependant diabetic, city placed him on leave of absence without pay and relieved him of his job as a city bus driver. Employee then brought suit against city under the Americans with Disabilities Act (ADA), contending that violation occurred when city failed to seek from the Department of Transportation a waiver of his regulatory disqualification from operating a bus, and when city failed to place him in another position on city payroll. The United States District Court for the Western District of Texas, Lucius Desha Bunton, III, J., entered judgment on jury verdict awarding plaintiff $5,000 in compensatory damages, and city appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) employee was not a "qualified individual with disability" respect to city bus driver position

because his medical condition presented genuine substantial risk that he could injure himself or others, and thus essential element of claim was lacking even if city could have accommodated employee by obtaining a waiver, and (2) city's failure to reassign employee to another position on city payroll did not violate its reasonable accommodation obligation under the ADA, absent evidence that city treated employee differently from any other part-time employee whose job was eliminated.

Judgement reversed and case dismissed.

1. Civil Rights 173.1

Insulin-dependant diabetic was not a "qualified individual with a disability" within meaning of the ADA with respect to city bus driver position, and thus city was not required, as matter of accommodation, to seek waiver of Department of Transportation regulation prohibiting him form operating a bus seating more than 16 passengers; driver with insulin-dependant diabetes is not "other-wise qualified" because his medical condition presents genuine substantial risk of injury to himself or others. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8).

2. Civil Rights 173.1

With regard to section of the ADA defining "qualified individual with a

disability" as individual with disability who, with or without reasonable combination can perform essential functions of position "that such individual holds or desires," reference to employment an individual "desires" is not applicable only to job applicants; instead, language extends to individuals who are already employed and then become disabled. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8).

3. Civil Rights 173.1

Failure of city to reassign city bus driver diagnosed as insulin-dependant diabetic to another position on city payroll did not violate city's duty of reasonable combination under the ADA, absent evidence that driver was treated different from any other part-time employee whose job was eliminated. Americans with Disabilities Act of 1990, § 101(9), 42 U.S.C.A. § 12111(9).

4. Civil Rights 173.1

ADA does not require affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those not disabled; it prohibits employment discrimination against qualified individuals with disabilities, no more and no less. Americans with Disabilities Act of 1990, §102(b)(5)(A), 42 U.S.C.A. §12112(b)(5)(A).

Daniel H. Hernandez, Laura K. Norden, Asst. City Attys., El Paso, TX, for appellant.

Howard A. Hickman, Smith & Gopin, El Paso, TX, for appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, GARWOOD and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:

Carl Daugherty was awarded a money judgment against the City of El Paso under the Americans with Disabilities Act (ADA or Act), 42 U.S.C. §§ 12101-12213. We reverse and render.

BACKGROUND

In 1991 Daugherty was hired by the city as a "coach operator," i.e. a public bus driver. This position was a part-time permanent position under the city's civil service regime. In June of 1992 Daugherty was diagnosed as an insulin-dependant diabetic. As a result of this diagnosis the city placed him on a leave of absence without pay and relieved him of his job as a coach operator. As discussed further below, Daugherty does not argue, nor does do we see, that the city violated the ADA by relieving Daugherty of his position as a coach operator upon his diagnosis. Instead,

Daugherty argues that a violation occurred because the city failed to pursue a waiver of his disqualification from operating a commercial motor vehicle with the Department of Transportation, and failed to place him in another position on the city payroll.

After a jury trial, the court entered judgment for $5000 in compensatory damages as found by the jury, together with backpay, interest and attorney's fees as determined by the court.

DISCUSSION

The city raises numerous arguments on appeal. Among them, it argues that Daughtery does not have a disability under the ADA, that he was not a "qualified individual with a disability," and that the city established as a defense that it acted in good faith to make a reasonable accommodation for Daugherty. To place these arguments in legal context, we briefly set out the relevant contours of the ADA.

The ADA expansively prohibits discrimination in employment against persons with a disability, providing that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges

of employment." 42 U.S.C. § 12112(a). A "disability" includes "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" and "being regarded as having such impairment." Id. § 12102(2).

A "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id § 12111(8). "Discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." Id §12112(b)(e)(A). "The term 'reasonable accommodation' may include... 'reassignment to a vacant position.'" Id §12111(9) (emphasis added). However "[i]t may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards... that screen out or tend to screen out or otherwise deny a job... to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation...." Id § 12113(a). "'[Q]ualification standards' may include a requirement that an

individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Id § 12113(b). "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation." Id § 12111(3).

The city argues that Daugherty's medical condition is not a disability under the ADA, Finding other issues dispositive, we pretermit the question of whether insulin-dependant diabetes, either as a general matter or under the specific facts of this case constitutes a disability under the Act.[1]

A. *Qualified Individual with a Disability*

The city argues that Daugherty was not a qualified individual with a disability. We agree in part. Daugherty was not qualified to perform the essential functions of a city bus driver once he was diagnosed as an insulin-dependant diabetic. He does not argue otherwise. He concedes in his brief that "[t]he Department of Transportation regulations... prohibited him from operating a truck over 26,001 pounds or a bus which seats more than 16 passengers." The parties stipulated at trial that federal regulations prohibit individuals with insulin-dependant diabetes from operating commercial motor vehicles, i.e. those that weigh more than 26,001 pounds or buses which seat more than 16 people.[2] Daugherty makes no argument that the

ADA's requirement that the employer reasonably accommodate the disability would extend to violating federal law.

The city argues that our inquiry should end here. Daugherty argues, however, that as a reasonable accommodation, the city either should have requested a waiver from the Department of Transportation, or reassigned him to another position.

B. Reasonable Accommodation

1. Waiver of Federal Regulations

[1] The Department of Transportation does provide for waivers of its regulatory requirements. There were disputes here as to whether a waiver is possible given Daugherty's medical condition,[3] and the extent to which the city pursued a waiver. Our decision, however, does not turn on these factual issues.

Instead, we believe we are bound by Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993). In Chandler, the City of Dallas adopted requirements for "primary drivers" whose positions require frequent driving. As in our case, the city followed Department of Transportation regulations which provide that an insulin-dependant diabetic is not a qualified driver. Plaintiff Chandler was deemed unqualified for his primary driver position as an electrical repairman. The district court entered

relief in his favor. We reversed and rendered.

In Chandler, the claim was brought under the Rehabilitation Act, 29 U.S.C. §§ 701-797b, which prohibits discrimination against individuals with disabilities in programs that receive federal financial assistance. The elements of a cause of action at issue in our case, however, are virtually the same under the Rehabilitation Act and the ADA. As explained above, the ADA prohibits discrimination against a "qualified individual with a disability," and discrimination includes not making a reasonable accommodation for "an otherwise qualified" individual with a disability. 42 U.S.C. §§ 12112(a), 12112(b)(5)(A). Similarly, the Rehabilitation Act prohibits discrimination against an "individual with a disability"[4] who is "otherwise qualified." 29 U.S.C. § 794. We also noted in Chandler that the two Acts define a disability in substantially the same terms. 2 F .3d at 1391.

In Chandler, we reasoned as follows. The definition of a qualified handicapped individual under the Rehabilitation Act includes a personal safety requirement:

> [A]n otherwise qualified handicapped individual is defined as one who "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." "[U]nder section 504, an individual is not

> qualified for a job if there is a genuine substantial risk that he or she could be injured or could injure others, and the employer cannot modify the job to eliminate that risk."

Id. at 1393 (quoting Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir.1991)). Again, the ADA by its terms recognizes the same safety requirement. It allows qualification standards that "include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," and defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. §§ 12113(b), 12111(3).

Pursuing this inquiry further, we held as a matter of law that a driver with insulin-dependent diabetes is not otherwise qualified because his medical condition presents a genuine substantial risk that he could injure himself or others:

> The issue whether an insulin dependent diabetic is otherwise qualified for positions involving driving or other high risk activities has been addressed by several federal courts Those courts have uniformly held that insulin dependent diabetics present an unacceptable risk, and are thus not otherwise qualified, to be employed as, interalia, sanitation truck

> drivers or special agents with the Federal Bureau of Investigation. We are aware of no cases holding that insulin dependent diabetes does not present a significant risk in connection with the operation of motor vehicles on public highways.
>
> We hold that, as a matter of law, a driver with insulin dependent diabetes . . . presents a genuine substantial risk that he could injure himself or others. We echo the sentiment expressed by this court in Collier [v. City of Dallas, 798 F.2d 1410 (1986)]: "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident."

2 F.3d at 1395 (citations, footnotes omitted).

A waiver of Department of Transportation regulations would in no way address the concern stated in Chandler, it might avoid the legal impediment to Daugherty's desire to continue to drive a bus, but it would not alter his medical condition. In our circuit, such a condition, as a matter of law, makes him not "otherwise qualified" to drive a bus under the Rehabilitation Act. For the reason as explained above, this holding likewise compels us to hold that under the ADA Daugherty is not "a qualified individual with a disability" for the position of bus driver. This

essential element of his claim is lacking even if the city could have accommodated him by obtaining a waiver.

2. Reassignment

[2] In the alternative Daugherty argues that the city should have made a reasonable accommodation by reassigning him to another position on the city payroll. To be sure, under the ADA a reasonable accommodation "may include ... reassignment to a vacant position," 42 U.S.C. § 12111(9) (emphasis added), and the Act defines a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id. § 12111(8) (emphasis added). Contrary to the city's position, we do not read the statutory reference to employment an individual "desires" as applicable only to job applicants. Instead we read this language as extending to individuals like Daugherty who are already employed and then become disabled, since the broad prohibition against discrimination found in 42 U.S.C. § 12112(a) extends not only to hiring and job application procedures, but to advancement, discharge of employees, "and other terms, conditions, and privileges of employment." The evidence relevant to this issue, disputed where indicated, included the following.

[3] After his diagnosis, Daugherty was placed on leave without pay. The city did provide him with a monthly stipend for some period of time and paid his tuition for retraining. Daugherty was referred to the city's personnel office, which posts job openings. The personnel office does not have authority to hire for other departments, but did apprise Daugherty of several openings. City employment practices generally are governed by city charter, which can only be changed through an election. The charter gives an order of priority for filing vacancies. While employees physically incapacitated from performing their jobs are given the highest priority, full-time employees are given priority over part-time employees such as Daugherty. The city has relatively few part-time positions. The city's director of personnel explained the problems the city would have faced if it had ignored the charter's hiring priorities: "If we were to give Mr. Daugherty a full time position, we might very well have a complaint from an employee who had been waiting for that vacancy for promotion, who had been a full-time employee five to ten years,had been preparing for that job and Mr. Daugherty was placed in it with some eight or nine months service, priority over him. I believe we would have had a lawsuit." A part-time employee can move to a full-time position only after taking a original exam or a promotional exam.

The city offered evidence that it did offer a toll booth position to Daugherty, but he rejected it because the pay was too low. Daugherty claims that the position was never actually offered to him. Daugherty applied to take an examination for a fire dispatcher, a position he found posted at the personnel office. He wa later informed that he was disqualified from taking the examination, since under civil service rules an employee is not eligible to take a promotional exam unless he has received at least a "meets minimum requirements" rating on the last two performance evaluation reports for his current position. On one such report Daugherty had received a lower "marginal" rating. This report preceded his diagnosis for diabetes, and there was no evidence that his later diagnosed condition played any role in the evaluation.

The personnel office also apprised Daugherty of openings that would be available for airport shuttle bus positions. These positions were not covered by the Department of Transportation regulations discussed above. These were full-time positions. None of the positions were filled by new hires or part-time employees. Daugherty would have needed to take an examination to qualify for the shuttle bus position. While the personnel manager who was working with Daugherty in the personnel office admitted that he did not inform Daugherty of the date of the exam, he did tell Daugherty of the date of the exam, he did tell Daugherty to look at the job

announcement. As for obtaining the application to take the exam, his position was that Daugherty "is a grown man, he should have done it."

The extent to which Daugherty was willing to accept other positions was disputed. On August 19, 1992, he wrote a letter to the city in which he requested that (1) he be reinstated to the coach operator position, (2) the city file a waiver application, and (3) "[a]s a last resort, I wish the City Personnel office to find a position within the City "that, I am qualified for with no loss of pay, hours, or seniority." The city's director of personnel explained the difficulties in meeting these demands: "I think primarily what we mean is that to accommodate Mr. Daugherty in the way that he requested accommodation, same pay, same, at least same hours, would have required us to probably put him in a full time position. If we had done that, we would have violated our own rules and regulations, we would have subjected ourselves to a lot of liability, which ends up being an undue hardship not only on the City, but for the taxpayers." Daugherty claims that he was willing to take other positions as well. He testified that he made daily trips to the personnel office, that it would get his hopes up by telling him of positions, and then dash his hopes by telling him later that he was not qualified for them.

Again, we find guidance in a Rehabilitation Act case, Chiari. We explained in that case that under that

Act, "[t]he City must accommodate [plaintiff's] disease unless it "can demonstrate that the accommodation would impose an undue hardship on the operation of its program." For example, the City is not required to fundamentally alter its program. Nor is the City required to find or create a new job for [plaintiff]...." 920 F .2d at 318 (citations omitted). Such an approach is equally applicable to the ADA, which recognizes that an employer is not required to endure undue hardship in accommodating the disability. 42 U.S.C. § 12112(b)(5)(A).

Even viewing all the disputed evidence in favor Daugherty, his ADA claim must fail because he did not show that he was treated differently from any other part-time employee whose job was eliminated. Perhaps the city could fundamentally alter its approach towards all its displaced employees. Perhaps it could be more flexible in assigning part-time employees whose jobs are eliminated to full-time positions, more helpful in matching displaced employees to openings in other departments, prompter in lining up job interviews at departments with openings, etc. What Daugherty failed to show, however, was that any such alleged failings were the result of discrimination based on his disability. There was no proof that the city treated him worse than it treated any other displaced employee.

[4] Stated another way, we do not read the ADA as requiring affirmative

action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disable. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.

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[1] We note, however, that the Equal Employment Opportunity Commission in its Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Part 1630 App. (1994), believes that insulin-dependent diabetes is a disability under the Act:

> The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices.... Fox example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.
>
> . . .
>
> Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited

because the individual cannot perform major life activities without the aid of medication.

[2] See 49 C.F.R. §§ 383.5, 383.23, 383.71, 391.41 (1994). the city also produced undisputed evidence that an applicant for a Texas intrastate commericial driver's license must also meet the physical qualifications set out in § 391.41, which requires that the driver have "no established medical history or clinical diagnosis ofdiabetes mellitus currently requiring insulin for control."

[3] Compare 49 U.S.C. § 31136 and 49 C.F.R. § 383.7 (1994) (general provisions for waiver of compliance with commercial motor vehicle reglations) with 49 C.F.R. § 391.49 (1994) (limiting waiver of physical requirements found in 49 C.F.R. § 391.41 to certain impairments not including diabetes).

[4] The Rehabilitation Act previously referred to individuals with a "disability" as "handicapped" individuals.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50212

CARL DAUGHERTY,

Plaintiff-Appellee,

versus

THE CITY OF EL PASO,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(August 8, 1995)

Before REAVLEY, GARWOOD and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case id denied.

ENTERED FOR THE COURT:

United States Circuit Judge